HOCK HUA BANK BHD

v.

CHOO MENG CHIONG & ANOR

HIGH COURT SABAH AND SARAWAK, SIBU
TEE AH SING J
[ORIGINATING SUMMONS NO: 24-40 OF 1998]
4 JANUARY 1999

BANKRUPTCY: *Capacity of bankrupt - Whether bankrupt capable of making contract - Whether bankrupt can register as proprietor of land - Whether bankrupt can deal with land or interest in land*

BANKRUPTCY: *Charge - Whether charge void against Official Assignee - Whether land and interest in land rest in Official Assignee in law*

BANKRUPTCY: *Official Assignee - Whether Official Assignee had locus standi to allege fraud to set aside charge - Whether Official Assignee party to Originating Summons*

CIVIL PROCEDURE: *Parties - Whether correct procedure to include Official Assignee as party to Originating Summons for sale of land*

CIVIL PROCEDURE: *Locus standi - Whether Official Assignee had locus standi to complain against charge*

The plaintiff filed an originating summons for an order of sale under s. 148(2)(c) of the Land Code (Cap. 81) ('the LC') and named the Official Assignee ('the OA') as the 2nd defendant. The 1st defendant had charged his land ('the said property') as security for the repayment of a sum of money advanced by the plaintiff to the 1st defendant.

The OA argued that he should not be named as a party for the foreclosure action. He should only be extended a copy of such proceedings. He contended that at the material time when the said property was charged to the plaintiff, the 1st defendant was already adjudged a bankrupt. The 1st defendant was therefore no longer the owner of the said property as by virtue of s. 24(4) of the Bankruptcy Act 1967 ('the BA'), the said property rested in the OA and became divisible upon his bankruptcy. The charge thus was illegal and void against the OA.

The plaintiff submitted that ss. 36, 37 & 38 of the BA and the Contracts Act 1950 do not prohibit a bankrupt from entering into a contract to buy or sell land or to borrow money for those purposes. There are no provisions in the BA that state that contracts entered by a bankrupt after he is adjudged a

bankrupt are void against the OA. The LC does not prohibit a bankrupt from being registered as a proprietor of land and dealing in land. Land that is acquired by or devolves on the bankrupt after the commencement date and before his discharge ('the after acquired property') is not vested in the OA because there is no vesting provision in the BA for the after acquired property. Further, it was contended that in the Torrens System of land registration, lands and interests in land belonging to a bankrupt vest in equity and not in law in the OA. The land will only vest in the OA if requirements under s. 169 of the LC are met. The plaintiff also submitted that the only ground that could set aside the charge was fraud under s. 132 of the LC but the OA having no legal or equitable interest in the land, would have no *locus standi* to complain.

Held:

[1] There is no blanket provision to the effect that a bankrupt is incapable of making a contract.

[2] The LC does not prohibit a bankrupt from being registered as a proprietor of land and dealing in land or interests in land. The 1st defendant was not prohibited from entering into the contract to charge the land to the plaintiff.

[3] Section 169(1) of the LC provides that lands and interest in land belonging to a bankrupt rests in equity in the OA. It will only vest in the OA at law when the requirements of registration as provided by s. 169(4) are met. The charge in favour of the plaintiff had been registered before any transmission was registered by the OA. Thus, the bankrupt's interest would, notwithstanding his bankruptcy, pass to the plaintiff.

[4] The charge was not void against the OA. The OA had not proved fraud even if he had the *locus standi* to invoke the fraud exception under s. 132 of the LC and therefore the charge was valid against the OA.

[5] The plaintiff was a secured creditor by s. 8(2) of the BA and could proceed with the originating summons, as if the 1st defendant was not a bankrupt for the purpose of the application for an order of sale of the said property under s. 148(2)(c) of the LC.

[6] Section 8(1) of the BA did not apply. The OA should not be made a party to the proceedings.

[Application allowed; OA to be struck off as a party to the application with costs to be taxed.]

Case(s) referred to:
Malayan Banking Bhd v. The Official Assignee [1993] 2 AMR 48 ***(foll)***
Official Assignee v. Ngu Ung Yong [1988] 2 MLJ 264 ***(refd)***
Re Chua Tin Hong, ex p Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174 ***(foll)***
Re Kwan Chew Shen [1987] 1 CLJ 314 ***(foll)***
Tai Lee Finance Co Sdn Bhd v. Offial Assignee [1983] 1 MLJ 81 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 8(1), (2), 24(4), 36, 37, 38, 48, 49, 52, 53, 55(5)
Land Code (Cap. 81), ss. 13A, 13B, 13C, 132, 148(2)(c), 169(1), (4)
National Land Code 1965, s. 349

For the plaintiff - Mark Teng (Johnny Tu with him); M/s David Allan Sagah & Teng
For the 2nd defendant/official assignee - Ko Fui Leong

Reported by Michele Saw

JUDGMENT

Tee Ah Sing J:

In this originating summons Choo Meng Chiong is the 1st defendant and the official assignee, is the 2nd defendant.

In para. 3 of the affidavit of Chieng Huo Hie affirmed on 19 February 1998, it was averred that by a memorandum of charge dated 10 June 1997 executed by the defendant and the plaintiff and registered as Instrument No. L.6746/97 at the Sibu Land Registry Office on 11 June 1997 the defendant charged his land mentioned in the schedule thereto to the plaintiff as security for the repayment of the sum of RM60,000 advanced by the plaintiff to the defendant.

The amount outstanding and due to the plaintiff including interest as at 30 November 1997 was RM63,272.14.

Before the hearing commenced, the representative from the official assignee raised an objection. He submitted that in view of s. 8(1) of the Bankruptcy Act 1967 ("the BA") and in view of the High Court decision of *Malayan Banking Berhad v. The Official Assignee (Receivers of the estate of Velu Marimuthu (bankrupt))* [1993] 2 AMR 48, the official assignee need not be named as a party for the foreclosure action but only the official assignee need to be extended a copy of such proceeding. The question of entering appearance does not arise. He objected to the originating summons on the grounds that when the 1st defendant charged the land to the plaintiff he was already adjudged bankrupt in Bankruptcy Proceedings No. 29-340-96 on 12 May 1997 whereas the property was charged to the plaintiff and registered by Instrument No. L.6746/97 at Sibu Land Registry on 11 June 1997. At that material time he was no longer the owner of the said property as by virtue of s. 24(4) of

the BA the said property was vested in the official assignee and become divisible upon his bankruptcy. Therefore the charge created after the 1st defendant was adjudged bankrupt is illegal and void against the official assignee. Pursuant to s. 55(5) of the BA the plaintiff ought to deliver to the official assignee the said security which by law is not entitled to retain as against the official assignee.

The learned counsel for the plaintiff in his written submission contended, *inter alia,* as follows:

1. (a) The date of the sale and purchase agreement was 28 May 1997.

   (b) The loan was approved on 5 June 1997.

   (c) The statutory declaration of not bankrupt was dated 10 June 1997.

2. The BA must be read subject to the Land Code. (See *Re: Kwan Chew Shen T/A Syarikat Kaaf (Official Assignee of the Property of Kwan Chew Shen, a bankrupt v. Citibank NA)* [1987] 1 CLJ 314 and *Re: Chua Tin Hong Ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174).

3. The land was purchased by the bankrupt and registered in his name after he was adjudged bankrupt. The land was charged by the bankrupt to the plaintiff after he was adjudged bankrupt.

4. Sections 36, 37 and 38 of the BA and the Contracts Act 1950 do not prohibit a bankrupt from entering into contract to buy or sell land or to borrow money for those purposes. The bankrupt was not prohibited by the BA to enter into the said sale and purchase agreement, the transfer and the charge. (See *Re: Kwan Chew Shen* case *supra*).

5. Void transactions are specifically provided in ss. 52 and 53 of the BA and they deal with transactions done before the commencement of bankruptcy and not subsequently thereof. There are no provisions in the BA that state that contracts entered by a bankrupt after he was adjudged bankrupt are void against the official assignee. Therefore the said sale and purchase agreement, the transfer and the charge were not void against the official assignee.

6. The Land Code does not prohibit a bankrupt from being registered as a proprietor of land and dealing in land or interests in land (see ss. 13A, 13B and 13C and generally of the Land Code).

7. The land only became the property of the bankrupt, that is, vested in or acquired by the bankrupt after the registration of the transfer and the charge, the issuance of Form L by the Land Registry and the subsequent

payment of the balance purchase price of the land to the vendor of the land. At that point in time, the land was encumbered with the charge.

8. Upon the making of the adjudication order, s. 24(4) of the BA only vest the property of the debtor in the official assignee and not those property acquired by or devolves on the bankrupt after the commencement date of the bankruptcy and before his discharge ("the after acquired property"). There is no vesting provision in the BA for the after acquired property. This is further supported by s. 49 of the BA (dealing with second bankruptcy).

9. If it is decided that the land being acquired by the bankrupt after he was adjudged bankrupt was vested in the official assignee, then the official assignee, after registered as proprietor of the land shall take the same subject to the charge to the plaintiff. This is because the official assignee can take no better title than that already held by the bankrupt. (See *Official Assignee v. Ngu Ung Yong* [1988] 2 MLJ 264 at p. 268).

10. Alternatively, even if it is held by this court that the after acquired property of a bankrupt is vested in the official assignee and that the land is not subject to the charge, it was submitted that in the case of lands under the Land Code, the official assignee only has an equitable interest in the same prior to the same being transmitted and registered in the name of the official assignee and it is subject to be defeated by the registration of subsequent interests.

In *Re: Kwan Chew Shen* case *(supra)* and *Re: Chua Tin Hong* case *(supra)* it was held that in the context of lands under the Torrens System of land registration (in the present case, it is under s. 169(1) and 169(4) of the Land Code), lands and interest in land belonging to the bankrupt vest in equity (and not in law) in the official assignee. It will only vest in the official assignee at law when the requirements of the law of registration as provided by s. 349 of the National Land Code (in the present case it is s. 169 of the Land Code) have been met. In order to ensure that a registered proprietor of land who has been adjudged a bankrupt does not deal with the land before it is vested in the official assignee, the official assignee ought to caveat the land under the Land Code.

The only ground that can set aside the said memorandum of charge is fraud (see s. 132 of the Land Code). This exception is to protect a person being deprived of his known existing right. (See *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee* [1983] 1 MLJ 81 at p. 84). The official assignee has no legal or equitable interests in the land, therefore the official assignee has no *locus standi* to complain.

Even if the official assignee has the *locus standi* to invoke the fraud exception under s. 132 of the Land Code, the official assignee did not allege fraud.

Moreover, the plaintiff was a "purchaser in good faith and for value of any interest" when dealing has no knowledge that the bankrupt was a bankrupt as the bankrupt even affirmed a statutory declaration to state that he was not a bankrupt. The plaintiff only knew that the bankrupt was a bankrupt after everything is completed.

Section 8(1) (read with ss. 8(2), 24 and 48) of the BA does not apply and there are no provisions in the Land Code or the BA that the official assignee be joined as a defendant in the originating summons for the sale of the land (being a property acquired by the bankrupt after he was adjudged bankrupt) or that leave of the court is required thereof.

I shall now deal with the matter before me.

In *Re: Kwan Chen Shen T/A Syarikat Kaaf (Official Assignee of the Property of Kwan Chew Shen, a bankrupt)* [1987] 1 CLJ 314 His Lordship V.C. George J (as he then was) at p. 318 said:

> 16. Having the Torrens system in particular s. 349 of the National Land Code in mind, it is obvious that s. 24(4) of the Bankruptcy Act should be read subject to the requirements of s. 349, as far as land and interest in land is concerned. This is not to make for s. 24(4) to be pointless. S. 24(4) of the Bankruptcy Act and s. 349 of the National Land Code should be read as complementing each other. S. 24(4) in the context of the Torrens system has the effect that upon the adjudication of bankruptcy, land and interest in land belonging to the bankrupt vests in equity (and not at law) in the Official Assignee. It will only vest in the Official Assignee at law when the requirements of the law of registration as provided by s. 349 have been met.

And at p. 319 His Lordship said:

> 19. Sections 36 and 38 of the Bankruptcy Act set out the disqualifications and disabilities of a bankrupt. *Inter alia* he may not hold certain offices, he may not sue without the sanction of the Official Assignee, he may not without the permission of the Official Assignee enter into or carry on any business, become a director (or take part in the management) of any company and so on. While he may not enter into a contract that would amount to his carrying on a business, it is significant that there is no blanket prohibition, express or implied, for a bankrupt to enter into a contract.
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> 20. In the National Land Code (see section 43) it is seen that while minors are specifically precluded from the classes of persons and bodies who may move the State authority in respect of its powers to dispose of land, bankrupts are not, not even by implication. Again in respect of the creation of charges

there does not appear to be any exclusion of bankrupts being chargors. Further, while persons of unsound mind are specifically excluded from being competent persons to enter into contracts by s. 11 of the Contracts Act, bankrupts are not.

And at p. 320 His Lordship said:

21. The upshot of all this is that there appears to be no blanket provision anywhere to the effect that a bankrupt is incapable of making a contract.

22. I agree with Encik Ong See Seng that the provisions of s. 49 of the Bankruptcy Act for there to be a second or subsequent receiving order fortify the view that a bankrupt in fact is competent to enter into contracts other than those that he had specifically been excluded from entering into.

I am therefore of the view that the BA does not prohibit a bankrupt (*ie*, the 1st defendant) from entering into the contract to charge the said land to the plaintiff. I agree with the contention of the plaintiff that the Land Code does not prohibit a bankrupt from being registered as a proprietor of land and dealing in land or interests in land (see ss. 13A, 13B and 13C and generally of the Land Code). Therefore the 1st defendant has the capacity to charge the said land to the plaintiff.

Section 169(1) of the Land Code reads as follows:

169. (1) Whenever a proprietor, chargee or sub-lessee shall die, become bankrupt or be declared mentally disordered, the representative of such person shall present to the Registrar in Form N in the First Schedule a written application to be registered as proprietor, chargee or sub-lessee, together with the issue document of title and such other documents as may be necessary, and the original and a certified copy of the certificate of representation, or other satisfactory proof that he is legally entitled to be registered as proprietor, chargee or sub-lessee, as the case may be. The Registrar shall thereupon make on the Register and issue document of title and, in the case of a chargee or sub-lessee, upon the memorandum of charge or sub-lease, appropriate entries showing the nature of the certificate of representation and the circumstances under which the applicant became entitled to be registered, and shall register him as proprietor, chargee or sub-lessee accordingly.

Section 169(4) of the Land Code reads as follows:

169. (4) Upon the registration being made pursuant to subsection (1), the representative shall hold the land, charge or sub-lease subject to all equities affecting the same but, for the purpose of any dealing therewith, shall be deemed to be the absolute proprietor thereof:

Provided that no charge or sub-lease executed by the representative of a deceased person shall be registered unless it has been consented to by a Probate Officer, as defined by the Administration of Estates

> Ordinance, or has been made under the authority of an order of a court of competent jurisdiction.

Under s. 169(1) of the Land Code, lands and interest in land belonging to the bankrupt vests in equity (and not in law) in the official assignee. It will only vest in the official assignee at law when the requirements of registration as provided under s. 169(4) of the Land Code have been met.

In this case since the charge in favour of the plaintiff has been registered before any transmission is registered by the official assignee, then the bankrupt's interest will, notwithstanding his bankruptcy, pass to the plaintiff. (See *Re: Chua Tin Hong Ex parte Castrol (M) Sdn. Bhd.* [1997] 3 CLJ Supp. 174).

I am of the view that the charge is not void against the official assignee. Even if the official assignee has the *locus standi* to invoke the fraud exception under s. 132 of the Land Code, the official assignee has not proved fraud. Therefore the charge is valid against the official assignee.

Section 8(1) and (2) of the BA reads as follows:

> 8 Effect of receiving order
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> (1) On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.
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> (2) This section shall not affect the power of any secured credit to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of section 31 of the Employment Act 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.

I am of the view that in the light of the express provisions of s. 8(2) of the BA the plaintiff as a secured creditor can proceed with the originating summons in the usual manner as if the 1st defendant is not a bankrupt for the purpose of application for an order for the sale of the said land under s. 148(2)(c) of the Land Code.

So I am of the view that s. 8(1) of the BA does not apply.

a I am of the view that the official assignee should not be made a party to the proceedings. As such, I order that the official assignee cited as the 2nd defendant be struck off as a party to the originating summons with costs to be taxed unless agreed. However, I overrule the other objections raised by the representative for the official assignee for the reasons as stated above.

b The plaintiff can proceed against the 1st defendant under the originating summons for an order of sale under s. 148(2)(c) of the Land Code.

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